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No. 07-395

IN THE
Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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October 4, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENTAL STATEMENT OF THE CASE 1

ARGUMENT 4

I. The Circuit Courts Have Adopted Different Tests for Determining the Timeliness of a § 1983 Lethal Injection Complaint. 4

II. Recent Developments Confirm that Mr. Arthur's Challenge to Alabama's Lethal Injection Protocol Warrants Substantive Review. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Beardslee v. Woodford,
395 F.3d 1064 (9th Cir. 2005) 5, 6

Cooey v. *Strickland*,
479 F.3d 412 (6th Cir. 2007) 4

Cooper v. Rimmer,
379 F.3d 1029 (9th Cir. 2004) 6

Harbison v. *Little*, No 3:06-012016,
2007 U.S. Dist. LEXIS 72410
(M.D. Tenn. Sept. 19, 2007) 9

DOCKETED CASES

Baze v. *Rees*, 217 S.W.3d 307 (Ky.
2006), *cert. granted*, 2007 U.S.
LEXIS 9066 (U.S. Sept. 25, 2007)
(No. 07-5439) ..... *passim*

Callahan v. *Allen*, 2:06-cv-00919
(M.D. Ala. 2007) 2

McNair v. *Allen*, 2:06-cv-00695
(M.D. Ala. 2007) ..... *passim*

MISCELLANEOUS

Stan Diel, *Riley Delays Arthur's Execution*, BIRMINGHAM NEWS, Sept. 28, 2007 ..... 3, 9

Phillip Rawls, *Alabama Changing Lethal Injection Procedure*, JACKSONVILLE NEWS, Sept. 26, 2007 ..... 3, 8-9

In granting certiorari in *Baze* v. *Rees*, 217 S.W.3d 307 (Ky. 2006), *cert. granted*, 2007 U.S. LEXIS 9066 (U.S. Sept. 25, 2007) (No. 07-5439), the United States Supreme Court will determine the proper legal standard for assessing the constitutionality of a method of execution. As noted by the petitioner in *Baze*, courts have applied inconsistent legal standards in assessing whether a particular lethal injection protocol constitutes cruel and unusual punishment. Courts have also applied inconsistent legal standards in assessing whether a complaint challenging lethal injection was timely filed. The Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have adopted conflicting tests resulting in a patchwork of stays and dismissals in lethal injection cases across the country.

Like the standard for determining the constitutionality of lethal injection, the standard for determining the timeliness of a lethal injection complaint needs to be clearly established to ensure that critical questions are not decided on the basis of where a complaint was filed. The Court should grant Mr. Arthur's Petition and decide this threshold issue of timeliness. The Court should also remand Mr. Arthur's Complaint so that it may be litigated on the merits.

SUPPLEMENTAL STATEMENT OF THE CASE

Since Mr. Arthur submitted his Petition for Writ of Certiorari and Motion for a Stay of Execution on September 21, 2007, new developments have occurred that bear directly on Mr. Arthur's Petition.

On September 25, 2007, the United States Supreme Court granted certiorari in *Baze* v. *Rees*, which challenges lethal injection procedures in Kentucky. Alabama apparently uses the same three-drug cocktail as Kentucky. In light of *Baze*, on September 25, 2007, Mr. Arthur filed a supplemental brief with the Supreme Court in further support of his Petition and motion seeking a stay of execution.

On September 26, 2007, Mr. Arthur's counsel received a telephone call from Scott Rouse, deputy legal advisor to the Governor of Alabama, Bob Riley. Mr. Rouse informed counsel that in connection with *McNair* v. *Allen*, 2:06-cv-00695 (M.D. Ala. 2007),[1] a lethal injection case currently pending in the United States District Court for the Middle District of Alabama, the State of Alabama has decided to make changes to its lethal injection protocol. The Governor, however, refused to stay Mr. Arthur's execution pending implementation of any changes and planned to proceed with Mr. Arthur's execution on September 27 pursuant to Alabama's current lethal injection protocol. In light of this development, Mr. Arthur filed a second supplemental brief with the Supreme Court in further support of his Petition and motion seeking a stay of execution.

On September 27, 2007, before the Supreme Court ruled on Mr. Arthur's motion for a stay, the Governor of Alabama granted Mr. Arthur a 45-day reprieve from his execution scheduled for that day "to allow the Department of Corrections sufficient

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[1] *McNair* was consolidated with *Callahan* v. *Allen*, 2:06-cv-00919 (M.D. Ala. 2007) on November 28, 2006.

time to make modifications to its lethal injection protocol." (A1)

According to Jeff Emerson, communications director for Governor Riley, the Governor's decision to change Alabama's protocol came on the heels of a recent ruling by a federal judge that Tennessee's lethal injection protocol is unconstitutional. *See* Stan Diel, *Riley Delays Arthur's Execution*, BIRMINGHAM NEWS, Sept. 28, 2007. After a bench trial, Judge Trauger of the United States District Court for the Middle District of Tennessee held that Tennessee's revised lethal injection protocol violates the Eighth Amendment. *See Harbison* v. *Little*, No 3:06-01206, 2007 U.S. Dist. LEXIS 72410 (M.D. Tenn. Sept. 19, 2007). As acknowledged by Jeff Emerson, "[Tennessee's] protocol is very similar to what Alabama does." Phillip Rawls, *Alabama Changing Lethal Injection Procedure*, JACKSONVILLE NEWS, Sept. 26, 2007.

On September 28, 2007, the district court in *McNair* v. *Allen* issued an order tentatively scheduling trial for the week of November 26, 2007. (A3-A4) In light of Alabama's plans to change its lethal injection protocol, the trial, originally scheduled for October 3, was postponed. During this trial in the Middle District of Alabama, the parties will present evidence, including testimony by experts, and a federal court will examine the constitutionality of Alabama's lethal injection protocol and any subsequent revisions implemented by the State.

On September 28, 2007, the State of Alabama moved the Supreme Court of Alabama to set an

execution date of November 15, 2007 for Mr. Arthur. The State of Alabama seeks to execute Mr. Arthur before this Court issues a decision in *Baze* and before the *McNair* trial commences.

ARGUMENT

I. The Circuit Courts Have Adopted Different Tests for Determining the Timeliness of a § 1983 Lethal Injection Complaint.

In its opposition, the State of Alabama maintains that "[t]here is no circuit split regarding which 'timeliness' requirement to employ in the stay context." (Opp. at 18.) The State is wrong.

The Sixth Circuit's test for measuring the timeliness of a § 1983 lethal injection complaint conflicts with the equitable standards adopted by the Fifth, Eighth, Ninth, and Eleventh Circuits. Under the Sixth Circuit's statute-of-limitations rule, an inmate's lethal injection claim accrues upon the conclusion of his direct appeal of his conviction. *See Cooey* v. *Strickland*, 479 F.3d 412, 422 (6th Cir. 2007). This rule requires death-sentenced inmates to litigate simultaneously habeas petitions attacking the validity of their conviction and sentence, and actions challenging the constitutionality of the procedure used to carry out the sentence.

The State of Alabama does not dispute that the Sixth Circuit's rule for measuring timeliness has created a circuit split. The State argues instead that "the district court did not address the statute-of-limitations issue and it was not raised in the Eleventh Circuit," and therefore such issue is not properly before the Court. (Opp. at 22-23.) This

argument is frivolous. Mr. Arthur is not directly challenging the propriety of the Sixth Circuit's rule, because the Eleventh Circuit applied a different test in finding his Complaint untimely filed. The fact that the Sixth Circuit's rule was not applied against him, however, does not bar Mr. Arthur from pointing out that such rule is inconsistent with tests adopted by other circuits—a significant factor favoring certiorari review. By its very nature, a circuit split means that courts in other jurisdictions have applied a test that is different than that applied in the case at hand. Consequently, it makes no sense to require a petitioner to challenge in the courts below the tests applied in other circuits before presenting such circuit split to the Supreme Court. The State of Alabama's nonsensical argument should be rejected.

Not only is there a conflict between a statute-of-limitations rule and an equitable standard for measuring timeliness, the courts of appeal that have applied the latter also disagree on the presumption that should attach to such standard. Unlike the Ninth Circuit, the Fifth, Eighth and Eleventh Circuits have adopted an irrebuttable "equitable presumption."

The State of Alabama nevertheless insists that the Ninth Circuit "applies the same 'timeliness' standard employed by the other courts of appeals" (Opp. at 20-21) in determining whether a death-sentenced inmate unreasonably delayed in bringing his lethal injection action. The two cases cited by the State, however, belie this assertion. In *Beardslee* v. *Woodford*, 395 F.3d 1064 (9th Cir. 2005), the Ninth Circuit held that "the district court should have conducted a fact-specific inquiry to ascertain whether

the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* at 1070. The Ninth Circuit expressly rejected the district court's application of "a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent." *Id.*

In *Cooper* v. *Rimmer*, 379 F.3d 1029 (9th Cir. 2004), the Ninth Circuit affirmed the dismissal of a lethal injection complaint filed by an inmate eight days before his scheduled execution. Before concluding that the plaintiff "had brought his challenge at the eleventh hour," the district court held a hearing to examine, among other things, "factual circumstances" and the likelihood of success on the merits. *Id.* at 1031.

Under the Ninth Circuit's standard for determining timeliness, the "strong equitable presumption against the grant of a stay" is not irrebuttable, and courts should engage in fact-specific inquiries, including whether a plaintiff "acted promptly" and "pursued his claims aggressively as soon as he viewed them as ripe." *Beardslee*, 395 F.3d at 1069.

In contrast, under the Eleventh Circuit's standard, the "strong equitable presumption against the grant of a stay" is essentially irrebuttable. (A20) Even if Mr. Arthur could show that he "had brought his suit in time to allow consideration of the merits," the Eleventh Circuit concluded that "the strong presumption against a stay [would have] operate[d] against him." (Pet. at A21) Instead of engaging in a fact-specific inquiry in assessing Mr. Arthur's Complaint, the district court found "prejudice as a

matter of law" (Pet. at A11-A12), and both courts below failed to consider whether the likelihood of success of Mr. Arthur's claims on the merits could overcome the "strong equitable presumption." Without any inquiry into the merits, the Eleventh Circuit (along with the Fifth and Eighth Circuits) has assumed the intolerable risk of permitting the unconstitutional execution of inmates pursuant to "equitable standards" that do not even specify when a method-of-execution claim becomes ripe.

Indeed, recent events in this case highlight the fundamental flaw in the Eleventh Circuit's standard for timeliness, which fails to recognize that a method-of-execution complaint raises an Eighth Amendment challenge to a future injury that will occur only *at the time of execution.* According to the State, Mr. Arthur should have brought his complaint in 2002 when Alabama changed its method of execution to lethal injection. (Opp. at 25.) Any judgment regarding the constitutionality of the protocol at that time, however, would be irrelevant now because Alabama decided to change its protocol *one day* before Mr. Arthur's scheduled execution. The Eleventh Circuit's "unreasonable delay" standard thus compels death row inmates to litigate method-of-execution claims before they are certain that they will be executed and before the actual protocol to be used is even determined.

In sum, the circuit courts throughout the country have adopted inconsistent measures for determining the timeliness of a § 1983 lethal injection complaint. The Sixth Circuit has adopted a statute-of-limitations rule that calculates the period from the conclusion of direct review to the date on

which the lethal injection complaint is filed. The equitable standard relying on an irrebuttable presumption adopted by the Fifth, Eighth and Eleventh Circuits is based upon the amount of time that remains before an inmate will be executed—a date that is subject to change and uncertainty. And the Ninth Circuit has adopted an equitable standard focusing on fact-specific inquiries, including whether a death row inmate pursued his claims aggressively as soon as he viewed them as ripe. Under the current state of the law, the outcome of lethal injection challenges brought by similarly situated death row inmates depends upon where the complaint was filed. This Court should grant certiorari to determine the proper measure for timeliness.

II. Recent Developments Confirm that Mr. Arthur's Challenge to Alabama's Lethal Injection Protocol Warrants Substantive Review.

In an attempt to discount the relevance of recent developments bearing on the merits of Mr. Arthur's Complaint, the State of Alabama argues that such developments were not presented to the Eleventh Circuit. (Opp. at 30.) Such a disingenuous argument ignores the fact that the developments occurred after Mr. Arthur had submitted his appellate brief. These developments confirm that Mr. Arthur should be afforded the opportunity to challenge Alabama's lethal injection protocol.

The State of Alabama has acknowledged that its current lethal injection protocol is substantially the same as Tennessee's protocol. *See* Phillip Rawls,

Alabama Changing Lethal Injection Procedure, JACKSONVILLE NEWS, Sept. 26, 2007 ("[Tennessee's] protocol is very similar to what Alabama does."). The very protocol that Alabama considers comparable to its own, however, has been found to be unconstitutional. After a bench trial, Judge Trauger of the United States District Court for the Middle District of Tennessee held that Tennessee's revised lethal injection protocol violates the Eighth Amendment. *See Harbison* v. *Little*, No 3:06-012016, 2007 U.S. Dist. LEXIS 72410 (M.D. Tenn. Sept. 19, 2007). Alabama's decision to change its protocol came on the heels of this ruling regarding Tennessee's lethal injection protocol. *See* Stan Diel, *Riley Delays Arthur's Execution*, BIRMINGHAM NEWS, Sept. 28, 2007.

In an apparent attempt to comply with the minimum standards required by the Eighth Amendment, the State of Alabama plans to conduct "an assessment of consciousness" after administration of the first drug of a three-drug cocktail—the same cocktail at issue in *Baze*. The State, however, has not yet decided who will conduct the "assessment of consciousness"—Department of Correction officers, the Warden or emergency medical technicians—or what such assessment will entail. Questions about the constitutionality of Alabama's lethal injection protocol remain unanswered.

In the upcoming trial of *McNair* v. *Allen*, a federal judge will resolve for the first time the constitutionality of the lethal injection protocol as applied in Alabama. With the benefit of the factual exposition of the *McNair* plaintiffs' claims at hand,

resolution of Mr. Arthur's substantially similar claims will likely be able to proceed quickly.

These recent developments highlight the importance of allowing Mr. Arthur to litigate the merits of his Complaint before he is executed by the very method that he challenges as unconstitutional. Mr. Arthur has demonstrated a strong likelihood of success in showing that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. As set forth in Mr. Arthur's Petition, courts around the nation have granted a variety of forms of relief on similar claims brought by death row inmates. (Pet. at 24-27.)

CONCLUSION

For the foregoing reasons and the reasons set forth in Mr. Arthur's Petition, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

Respectfully submitted,

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Counsel for Petitioner Thomas D. Arthur

October 4, 2007

APPENDIX

STATE OF ALABAMA

September 27, 2007

Mr. Richard F. Allen, Commissioner
Alabama Department of Corrections
AL Criminal Justice Complex
301 South Ripley Street
Montgomery, Alabama 36130

Dear Commissioner Allen:

By my authority under Amendment 38 to the Alabama Constitution, I hereby grant a reprieve of 45 days to Thomas D. Arthur, who is scheduled for execution on this date. The sole purpose of this reprieve is to allow the Alabama Department of Corrections sufficient time to make modifications to its lethal injection protocol. It is my desire that the Alabama Attorney General will make a motion for, and that the Alabama Supreme Court will promptly set, a new date of execution at the expiration of this 45-day period.

Sincerely,

Bob Riley
Governor

BR/rdg

cc: United States Supreme Court
Alabama Supreme Court

Alabama Attorney General Troy King
Suhana S. Han, Esquire

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

WILLIE MCNAIR, Plaintiff/Counter-Defendant, v. RICHARD ALLEN, *et al.*, Defendants/Counter-Plaintiffs.	)	CASE NO. 2:06-cv-00695-WKW

JAMES CALLAHAN, Plaintiff/Counter-Defendant, v. RICHARD ALLEN, *et al.*, Defendants/Counter-Plaintiffs.	)	CASE NO. 2:06-cv-00919-WKW

ORDER

It is ORDERED that the trial of this matter and all other dates and deadlines are CONTINUED. The trial is tentatively set for the week of November 26, 2007. A telephone status conference, to be arranged by the defendants, is SET for **October 31,**

2007, at 4:00 p.m. (CDT), at which other pretrial dates and deadlines will be discussed.

DONE this 28th day of September, 2007.

/s/ W. Keith Watkins
UNITED STATES
DISTRICT JUDGE